Editor's note: Reconsideration denied by Order dated Sept. 17, 1993

HESS CONSTRUCTION CO.

IBLA 90-250 Decided June 29, 1993

Appeal from a decision of the Las Vegas District Office, Bureau of Land Management, assessing trespass damages. NV 050-4-534

Affirmed.

1. Trespass: Measure of Damages

A determination to assess damages for removal of sand and gravel from Federal lands made by a contractor who lacked a contract of sale with BLM for the materials taken was properly assessed as a willful trespass. An unrelated transaction involving an earlier expired materials contract with BLM did not establish that the trespass was innocent so as to justify assessment at a lesser rate.

APPEARANCES: James B. Gibson, Esq., Las Vegas, Nevada, for Hess Construction Company.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Hess Construction Company (Hess) has appealed from a February 1, 1990, decision by the District Manager, Las Vegas District, Nevada, Bureau of Land Management (BLM), assessing $49,929.02 for sand and gravel materials removed in willful trespass from the East Community Pit in Clark County, Nevada, between January 12 and 19, 1990. The February decision found that Hess had, without first obtaining a contract of sale from BLM for the material taken, removed 196 cubic yards (cy) of reject sand valued at $5.24 per cy, 724 cy of type II material valued at $4.01 per cy, 9,908 cy of undefined material valued at $4.59 per cy, and 196 cy of pit run valued at $2.29 per cy. The BLM decision, citing sections 302 and 310 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1732, 1740 (1988), and 43 CFR 9239.0-7, found that unauthorized removal of materials from the East Community Pit constituted a willful trespass for which damages should be assessed for the full value of the material taken without deduction for costs of removal and marketing.

The District Manager found the trespass to be willful because Hess operated "without the benefit of a materials sales contract." For the purpose of calculating damages he used values for materials established

by mineral appraisal reports dated November 6, and December 12, 1989. Hess has not questioned the technical accuracy of these reports. The District Manager accepted volume statements submitted by Hess for type II reject sand and pit run material. For undefined material he computed that 9,908 cy of material was removed by Hess. Hess has not challenged the computations he made to arrive at the quantity of material taken. Instead, in a proposed settlement submitted to BLM as an "appeal" of the notice of trespass on February 5, 1990, Hess alleged that prior transactions between BLM and Hess involving a materials contract issued for the period extending from November 9 through December 9, 1989, established circumstances tending to show that removal of materials in January 1990 (when there was no valid contract with BLM) was not willful. Hess reasoned that the November-December contract contained internally inconsistent provisions at sections 1(a) and (c) of the contract terms that had justified removal of amounts in excess of the quantity allowed by the contract and invited later payment at the contract rate for removals in excess of the contract amount. In the contract executed by Hess in November, section 1(a) provided that "[a]ll materials in contract area in excess of estimated quantity [the amount contracted for by Hess] are reserved by the Government. * * * [R]emoval in excess of that quantity will subject Purchaser to trespass action." Section 1(c) stated that "[i]f total number of units * * * removed exceeds estimated units [quantity] additional units shall be paid for at unit rate at time and place designated by the Authorized Officer." Hess has construed this latter section as an invitation to exceed the stated amount of the contract, under the circumstances of this case.

According to Hess, section 1(c) was construed by BLM in December 1989 to permit Hess to exceed the quantity provided by the contract without prior notice to BLM and to then pay the balance owing at the contract rate on December 11, 1989, after the November contract had expired, when a separate contract was executed for the amount of material removed over the quantity allowed by the November contract. In making this argument, Hess assumes the materials contract issued on December 11, 1989, which by its terms expired on the day issued, allowed conduct that is now sought to be assessed as a willful trespass to be paid for at the contract rate. The December contract bears the notation "[t]his payment is for the amount taken over the amount paid for on permit dated 11-9-89."

This same argument is repeated in the statement of reasons (SOR) filed by Hess, which recites that BLM accepted payment at the contract rate for amounts in excess of the quantity provided by the November contract in December and "made no mention of a trespass" when the tardy payment was made. Because of this circumstance, it is concluded that "[t]he expectation [Hess] had is that * * * he would have the opportunity to settle up at the end of the month if in fact he removed more than [the estimated amount of the contract]."

The issue presented by this appeal is therefore whether Hess was properly assessed damages for willful trespass for unpermitted removal

of material. We find that damages were properly assessed by the District Manager for willful trespass in this case.

[1] Departmental regulation 43 CFR 9239.0-7 prohibits unauthorized removal of materials such as those at issue in this appeal and provides that such removal is "an act of trespass" for which the trespasser "will be liable in damages to the United States." See also 43 CFR 3603.1; Bolling Construction Co., 125 IBLA 303, 306 (1993) (removal of materials after expiration of materials sale contract constituted willful trespass); Frehner Construction Co., 124 IBLA 310, 312 (1992) (removal of sand and gravel exceeding the quantity provided by the material sales contract with BLM was a willful trespass). When the material removed by Hess between January 12 and 19, 1990, was taken there was no contract between Hess and BLM to permit any taking of sand and gravel materials by Hess. If, as Hess argues, it escaped payment of a trespass assessment in December under somewhat similar circumstances, such a fortuitous event could not prevent BLM from enforcing the public right to payment for a later trespass where such treatment was not authorized by law. See generally 43 CFR 1810.3(b). While the argument is made that an inconsistent provision of the November contract provides a justification for a finding that there was a "misunderstanding" or that the contract terms were unclear about the need to have a valid contract of sale when removing sand and gravel from the public lands, there has been no showing how an anomaly in an expired contract could justify removal of Government property without any authorization whatever to do so. The regulations cited above and our cases applying them are clear on this point: removal of materials such as those taken by Hess without prior authorization amounts to willful trespass. See, e.g., Frehner Construction Co., supra at 315.

The measure of damages to be applied in trespass cases such as this is determined according to the law of the state where the trespass occurred, if it has law to apply. See CM Concepts of Nevada, 126 IBLA 134, 139 (1993), where we found that there is Nevada law to apply in these cases, and that "[i]n Nevada, the willful trespasser is charged for the value of the material after it has been extracted and sold, with no deduction for the costs of extraction and marketing." Id. at 139. That is the measure that was applied by the District Manager in this case. Hess has not shown (nor has it been alleged) that the measure of damages applied in this case was incorrect, and we find that the District Manager's decision correctly stated the amount owed for the unauthorized taking made by Hess in January 1990.

We conclude, therefore, that because Hess took sand and gravel materials from public lands in the State of Nevada in excess of the authorized quantity sold by BLM under a prior mineral sales contract and after the expiration date of the contract of sale, it incurred liability for payment for the materials taken as a willful trespasser. Hess was therefore liable to BLM in damages for the value of the material taken after it was sold, without deduction for costs of removal and marketing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge